No. 01 454 AUG 09 2001

In the Supreme Court of the United States

NORMAN PRICER,

Petitioner,

v.

PETER MAGGIORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a U.S. citizen have a constitutionally protected right to contact an elected governmental representative about a matter of private concern and then have that representative intercede on the citizen's behalf?

PARTIES TO THE PROCEEDINGS

Petitioner - Norman Pricer

Respondent - Peter Maggiore

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Norman Pricer respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the lOth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the 10th Circuit is reproduced in App. A at 1a-5a.

The June 5th, 2000 opinion and order of the United States District Court for the District of New Mexico is reproduced in App. B at 6a-11a.

The August 21st, 2000 opinion and order of the United States District Court for the District of New Mexico is reproduced in App. C at 12a-16a.

JURISDICTION

This Court has jurisdiction under 28 USC Section !254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides the right of the people to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Respondent Maggiore, the secretary of the New Mexico Environmental Department (NMED), terminated Petitioner Pricer's employment at the NMED's Grants, Ncw Mexico's office and then offered Petitioner a position at the NMED office in Albuquerque, New Mexico, 80 miles away. Petitioner, who lives in Grants, then contacted Petitioner's state senator Joe Fidel in an effort to reverse Respondent's decision and keep Petitioner's job in Grants. After Senator Fidel interceded on Petitioner's behalf, Respondent retaliated against Petitioner by delaying Petitioner's job reclassification, denying Petitioner's annual raise, and taking other adverse employment actions against Petitioner. Petitioner contends that such action taken by Respondent is in violation of Petitioner's constitutionally protected right to petition the government with grievances, and therefore Respondent is liable pursuant to title 42 USC Section 1983. The U.S. District Court for the District of New Mexico, honorable James A. Parker presiding, granted Respondent's motion for summary judgment, finding that Petitioner's contact with his elected government representative was not a manner of public concern and was therefore not entitled to first amendment protection. The district court also found that Respondent was entitled to qualified immunity.

The 10th Circuit Court of Appeals affirmed the district court's decision that Petitioner was not entitled to first amendment protection because he did not contact his elected government representative regarding a matter of public concern. The court of appeals did not rule on thc district court's decision granting thc Respondent qualified immunity.

REASONS FOR GRANTING THE WRIT

I. There is a Conflict Among the Circuits.

Although the 10th Circuit Court of Appeals has held in this case that only matters of public concern are protected by thc First Amendments right to petition the government for redress of grievances, the 5th Circuit has held that individuals or businesses have the right under the first amendment to lobby the government for *"selfish even anti-competitive ends"*. *See Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F. 3d 316 (5th Cir. 1994) citing *Greenwood Utilities Comm'n v. Mississippi Power Co*, 751 F. 2d 1484, 1497 (5th Cir. 1985). According to the 5th Circuit, the first amendment right of petition guarantees all citizens the right to appeal to the legislature or the judiciary and is not conditioned upon motive *See Brown & Root supra* at 326, *citing Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124 (ND NY 1977) *aff'd* 578 F. 2d 1372 (2nd Cir).

The Circuit for the District of Columbia has held that *"While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged...in trying to persuade Congressional action is exercising the First Amendment right of petition"*. *See Liberty Lobby, Inc. v. Pearson*, 390 F. 2d 489, 491 (D.C. Cir. 1968).

Finally, the 6th Circuit Court of Appeals has stated that *"citizens' right to petition is not limited to goals that are deemed worthy"*. *See Eaton v. Newport Bd. Of Education*, 975 F. 2d 292, 298 (6th Cir. 1992).

II. The Question Presented is Important

According to John Madison, the petition clause was designed so that people *"may communicate their will"* through direct petitions to the legislature. *See Annals of Congress*, 738 (1789). Since every state has both federal and local elected government representatives, whether or not a *"public concern"* element is required before a constituent has the protected right to communicate his or her will is an issue of national importance. If a *"public concern"* element is required, all elected government representatives would have a limited scope of representation and would be put in the awkward position of having to warn their constituents that if the representative tries to help in a matter of private concern there could be lawful retaliation. Such a consequence would have a chilling effect on citizens seeking help from their government representatives and is contrary to the framers' stated purpose of the petition clause.

III. The Decision of the Court of Appeals is Erroneous

The 10th Circuit Court of Appeals cited their own case of *Martin v. the City of Del City*, 179 F. 3d 882, (10th Cir. 1999), as requiring an individual's government grievance to be a matter of public concern in order for the petitioning of that grievance to be a First Amendment protected activity. Petitioner takes the position that the *Martin* case is distinguishable from the case at hand, and that past U.S. Supreme Court rulings have held that contacting a representative such as a senator is by itself an activity protected by the First Amendment, whether or not such contact was for public or private gain.

In the *Martin* case, the plaintiff was a terminated city employee who claimed that his termination was in retaliation

for filing an internal transfer grievance with the city's Civil Service Commission. There is no mention in the *Martin* case that Mr. Martin ever contacted an elected legislative representative about his transfer or that such a representative interceded on Mr. Martin's behalf. The *Martin* Court compared Mr. Martin's petition to any other form of speech which they concluded must satisfy the public concern requirement before it becomes constitutionally protected.

The major distinction between the *Martin* case and the case at hand is the activity that each plaintiff is claiming to be protected by the First Amendment. In the case at hand, Petitioner is claiming he was retaliated against for not only contacting his state senator, but for having his state senator intercede on his behalf in an effort to avoid transfer. Petitioner is not arguing that the right to petition just covers his initial contact with his senator, for that was not the activity that ultimately triggered the retaliation. What made Respondent Maggiore retaliate against Petitioner was not just that Petitioner contacted his senator, but that the senator came forward on Petitioner's behalf and contacted one of the NMED's upper level officials in an effort to reverse Respondent Maggiore's decision to transfer Petitioner. Had Petitioner come forward on his own and simply petitioned the NMED with his grievance, the *Martin* decision would be applicable. But Petitioner is claiming that the activity that triggered the retaliation is the whole process of seeking and receiving assistance from his senator, and therefore the public or private nature of the grievance is immaterial.

In regard to the protected right to seek the assistance of a senator, the Martin Court acknowledged that the U.S. Supreme Court has interpreted the Petition Clause to apply to the right to petition the representatives of the people in Congress. *Id.* at 887. This protected right, without any public

concern requirement, has been upheld in numerous U.S. Supreme Court cases.

In the case of *Thomas v. Collins*, the Supreme Court stated:

> *The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones ..... The idea is not sound therefore that the First Amendment safeguards are wholly inapplicable to business or economic activity"*

323 U.S. 516 at 531, (1945) [emphasis added].

In the case of *Eastern R. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1960), the U.S. Supreme Court dealt with the an allegation that the railroad industry was violating the Sherman Anti-Trust Act by attempting to influence legislation to disadvantage their competitor, the trucking industry. Although the Supreme Court found that the railroad's "*sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long distance freight business" id.* at 138, the Court ultimately found that the railroad's selfish utilization of the legislative process was not a violation of the Sherman Act, and in fact constitutionally protected under the petition clause.

> *In a representative democracy such as this, these branches of government act on behalf of the people, and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that*

> *the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have not basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade those freedoms ....*

Id. at 138.

> ..... *It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors .... If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful .... Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act.*

Id. at 139.

The conclusion drawn from the *Noerr Motors* case is that the railroad had a constitutionally protected right to utilize the legislative process for their own financial benefit

and such an effort could not be outlawed under the Sherman Anti-Trust Act.

The ruling in the *Noerr* case was upheld by the 1965 Supreme Court case of *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). The *Pennington* case dealt with a union's self interested efforts to conspire and restrain and monopolize commerce by such measures as attempting to persuade the Secretary of Labor to establish minimum wages higher than in other industries anti urging the TVA to curtail spot market purchases. The *Pennington* Court found that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose". *Id.* at 655. Although the *Pennington* Court did not go into detail as to why attempts to influence public officials for private or public concern is shielded from the Sherman Act, the citing of the *Noerr* case on this very point upholds the *Noerr* Court's rationale that such efforts are constitutionally protected under the petition clause of the First Amendment.

In the case of *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971), which dealt with one highway carrier complaining that another highway carrier was unfairly using the courts and government agencies to weaken its competitors, the Supreme Court specifically concluded that:

> *it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the anti-trust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business*

> *and economic interests vis-a-vis their competitors.*

Id. at 507.

IN CONCLUSION, Petitioner contends that his right to contact his senator and obtain the senator's help concerning Petitioner's employment should receive the same protection as other individuals or companies who contact their senators for help concerning their economic, business or other *"selfish ends"*. If a corporation or industry has the right to lobby for more favorable government treatment from which they would privately profit, an individual should have the same right.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 00-2351

[Filed May 14, 2001]

NORMAN L. PRICER,
Plaintiff-Appellant,

v.

STATE OF NEW MEXICO,
Environmental Department, and
PETER MAGGIORE,
Defendants-Appellees.

JUDGES:

HENRY, BRISCOE, and MURPHY,
Circuit Judges.

ORDER AND JUDGMENT*

OPINION BY: Mary Beck Briscoe

OPINION

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Norman L. Pricer appeals from an order of the district court granting summary judgment to defendant in this action brought pursuant to 42 U.S.C. § 1983.[1] We affirm.

Mr. Pricer was employed by the New Mexico Environment Department.[2] Defendant Peter Maggiore, Mr.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] The district court stated that it was dismissing Mr. Pricer's claims. However, it appears the court was ruling on defendants' motion for summary judgment. Therefore, we review this case under summary judgment standards.

[2] The appendix submitted to this court consisted only of the transcript of the pretrial conference. We are thus constrained in our consideration of this appeal and rely on the district court's statement of the facts. See Fed. R. App. P. 10; 10th Cir. R. 10.3.

Pricer's supervisor, decided to transfer Mr. Pricer to the Albuquerque office from the Grants office. Mr. Pricer apparently lives in Grants and did not want to transfer. He contacted his State Senator to have the decision reversed. The Senator interceded on his behalf.

Mr. Pricer thereafter brought this action claiming that Mr. Maggiore had retaliated against him for exercising his First Amendment right to petition his elected state representative. He alleged that Mr. Maggiore delayed his job reclassification, denied him an annual raise, and took other adverse actions, thus violating his constitutional right to petition the government.

The district court determined that Mr. Pricer had not petitioned his Senator on a matter of public concern and therefore, he had not stated a claim. The district court also held that defendant was entitled to qualified immunity.

On appeal, Mr. Pricer asserts he has a constitutional right to contact his congressional representative about a matter of private concern and to have that representative intercede on his behalf. He also contends that Mr. Maggiore is not entitled to qualified immunity.

"We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court" under Fed. R. Civ. P. 56(c). *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is proper if the moving party shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The first element that a public employee must establish to determine whether a governmental entity may regulate his or her speech without offending the guarantees of the First Amendment is whether that speech touched upon matters of public concern. *Martin v. City of Del City*, 179 F.3d 882, 886 (10th Cir. 1999). Mr. Pricer admits that his speech did not involve matters of public concern. See Appellant's App. at 4. However, Mr. Pricer contends the public concern element is not required because his situation does not fall under the constraints of Martin. Mr. Pricer states that he, unlike the plaintiff in Martin, petitioned his state representative who apparently actually intervened on his behalf. The retaliation occurred in response to that intervention.

We agree with the district court that "this distinction lacks significance and that the 'public concern' requirement applies to" Mr. Pricer's claim. District Court's Memorandum Opinion and Order at 3. Mr. Pricer contends that his actions were protected by the Noerr-Pennington doctrine.[3] "It is more appropriate to refer to immunity as Noerr-Pennington immunity only when applied to antitrust claims. In all other contexts, . . . such immunity derives from the right to petition." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889-90 (10th Cir.), *cert. denied*, 148 L. Ed. 2d 120, 121 S. Ct. 175 (2000) (footnote omitted). Mr. Pricer cites to no other authority supporting his proposition, nor have we found any. Mr. Pricer's argument is without merit.

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[3] *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965).

Having determined that the district court properly granted summary judgment against Mr. Pricer on his legal claims, we need not address the issue of whether Mr. Maggiore is entitled to qualified immunity. The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 98-1310

[Filed 06/05/00]

Norman Pricer, *Plaintiff*	)
v.	)
Peter Maggiore, in his individual capacity, *Defendant*.	)

JUDGE: James A. Parker

MEMORANDUM OPINION AND ORDER

At a June 1, 2000 pretrial conference, I heard arguments on Defendant Maggiore's two unfiled motions for summary judgment requesting that summary judgment be entered in Defendant Maggiore's favor under Fed. R. Civ. P. 56.[1] Having considered the arguments of counsel and the applicable law, I conclude that Plaintiff's Section 1983 First Amendment claim against Defendant Maggiore should be dismissed with prejudice.

Background

This lawsuit arises out of Plaintiff's employment with the New Mexico Environment Department ("NMED"). Plaintiff alleges that in July 1996 Defendant Maggiore, who was then the Director of the Environmental Protection Division at NMED, decided to transfer Plaintiff from the Grants office to the Albuquerque office. Upset with the transfer, Plaintiff complained to State Senator Joe A. fidel. Plaintiff claims that Defendant Maggiore subsequently retaliated against Plaintiff for seeking and receiving Senator Fidel's assistance.

Plaintiff's sole remaining claim alleges that Defendant Maggiore violated Plaintiff's First Amendment right to petition and right to political association in violation of 42 U.S.C. § 1983.

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[1] These motions have been served on Plaintiff but have not yet been filed with the Court because the parties are still in the process of briefing the motions. *See* D.N.M.LR-Civ 7.3 (requiring that pre-judgment motions be filed as a packet along with copies of all papers related to the motion.

Discussion

At the pretrial conference, Defendant Maggiore argued that Plaintiff's First Amendment claim should be dismissed because Plaintiff's petitioning of Senator Fidel did not involve a matter of public concern as required by *Martin v. City of Del City*, 179 F. 3d 882, 886 (10th Cir. 1999). Defendant Maggiore also contended that Plaintiff's claim should be dismissed on the ground of qualified immunity.

Public Concern Requirement

Plaintiff argued at the conference that *Martin* is factually distinguishable from this case and that the "public concern" requirement therefore does not apply to Plaintiff's First Amendment claim against Defendant Maggiore. In *Martin*, the plaintiff appealed a job transfer tot he Del Rio City Civil Service Commission. *Martin*, 179 F. 3d at 884. On appeal to the Tenth Circuit, the plaintiff argued that the "public concern" requirement did not apply to First Amendment claims for alleged violations of the right to petition the government for redress of grievances. *See id.* at 886. The Tenth Circuit reviewed its earlier opinion in *Schalk v. Gallemore,* 906 F. 2d 491 (10th Cir. 1990), which held that the public concern requirement applied to the plaintiff's claim under the Petition Clause. Although the *Martin* court considered a "scholarly" Third Circuit opinion that reached the opposite conclusion from the one reached in *Schalk*, the Tenth Circuit concluded that "this panel must follow *Schalk's* holding, there being no intervening Supreme Court opinion and no *en banc* ruling by our court changing *Schalk's* application of the principles relating to the Petition Clause, the Free Speech Clause and the right of association provision of the First Amendment." *Martin*, 179 F. 3d at 889. The Tenth Circuit therefore rejected the plaintiff's claim that the

public concern requirement did not apply to his claim against the defendants for alleged violations of his First Amendment right to petition the government for redress of grievances.

Plaintiff sought to distinguish *Martin* on the ground that in that case the plaintiff petitioned the City's Civil Service Commission while in this case Plaintiff petitioned a state senator. Having reviewed *Martin* and the cases cited by Plaintiff in his unfiled response to Defendant's first motion for summary judgment, I conclude that this distinction lacks significance and that the "public concern" requirement applies to Plaintiff's right to petition claim. *See Brenner v. Brown*, 36 F. 3d 18 (7th Cir. 1994). In *Brenner*, the plaintiff complained about her supervisor to a state and federal senator. *See id.* at 20. On appeal, the plaintiff contended that she had "the right to complain to public officials about the conditions of her employment." *Id.* The Seventh Circuit rejected this argument, stating "the federal courts [ ] will not question a government employer's decisions relating to an employee's speech that is of an entirely private concern." *Id.* (citations omitted). Thus, the "public concern" requirement applies to Plaintiff's right to petition claim arising from his solicitation of Senator Fidel's assistance in avoiding a transfer to the Albuquerque office.

Application of the "public concern" requirement to this case dictates the conclusion that Plaintiff's request touched upon a matter of purely private concern. According to Senator Fidel's testimony, Plaintiff explained that he was being transferred because "they were reducing the staff at his office" and because "they were going to eventually close this office." (Fidel Depo. at 6.) Plaintiff testified that he had understood that his position in the Grants office was temporary, that he knew he could be laid-off, and that he told Senator Fidel that he "felt [he] had been set up on a position."

(Pricer Depo. at 52.) Thus, Plaintiff's communications with Senator Fidel did not raise questions concerning any discrimination or other kind of issue that would be of concern to the general public. *Cf. Kemp v. State Bd. of Agric.*, 803 P. 2d 498, 504 (Colo 1990) (finding that "[a]t least part of" plaintiff's letter to her elected representative "seems directed at exposing racial discrimination problems within the university" and holding that the letter touched upon a matter of public concern), *cert. denied*, 501 U.S. 1205 (1991).

Qualified Immunity

Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citation omitted). Once a defendant raises the qualified immunity defense, the plaintiff bears the "burden of convincing the court that the law was clearly established." *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F. 2d 642, 645 (10th Cir. 1988). To do so, the plaintiff "must do more than identify in the abstract a clearly established right and allege that the defendant has violated it." *Id.* In order for pre-existing law to be clearly established, there must ordinarily "be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F. 2d 1493, 1498 (10th Cir. 1992) (citation omitted), *holding limited on other grounds by Hinton v. City of Elwood*, 997 F. 2d 774 (10th Cir. 1993). The question of whether a plaintiff has invoked "clearly established law" is a question of law which the district court must decide. *Losavio*, 847 F. 2d at 646.

Defendant claims that his conduct did not violate Plaintiff's clearly established First Amendment rights because *Martin* established that a claim for the right to petition the government for redress of grievances was subject to the public concern requirement and because Plaintiff's grievance to Senator Fidel represented a matter of private concern. Having reviewed the law, I agree with Defendant and conclude that he is entitled to qualified immunity as to Plaintiff's First Amendment claim.

IT IS THEREFORE ORDERED that Plaintiff's Section 1983 First Amendment claim against Defendant Maggiore should be dismissed with prejudice.

/s/_____
JAMES A. PARKER,
UNITED STATES
DISTRICT COURT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 98-1310

[Filed 08/21/00]

Norman Pricer,	)
Plaintiff	)
	)
v.	)
	)
Peter Maggiore,	)
Defendant.	)
	)

JUDGE: James A. Parker

MEMORANDUM OPINION AND ORDER

On June 8, 2000 Defendant filed his Second Motion for Summary Judgment based on Qualified Immunity. (Doc. No. 69). Having carefully considered the briefs and the law, I conclude that the motion should be granted.

Background

At a June 2, 2000 pretrial conference the Court heard oral argument on Defendants' two unfiled motions for summary judgment. In a June 5, 2000 Memorandum Opinion and Order this Court granted Defendant's two motions for summary judgment on two separate grounds: 1.) that Plaintiff's speech was not a matter of public concern and was therefore not entitled to First Amendment protection; and 2.) that Defendant was entitled to qualified immunity.

On June 12, 2000 Plaintiff filed "Plaintiff's 6/12/00 Rule 59(e) Motion to Alter6/5/00 Summary Judgment." (Doc. No. 72), arguing that this Court should strike that portion of the Memorandum Opinion and Order granting Defendant's second motion for summary judgment because the Court granted the motion without hearing oral argument on it and without permitting Plaintiff to file a response to Defendant's motion. The Court pointed out in its July 21, 2000 Order, (Doc. No. 75), that Plaintiff's Rule 59(e) motion was an exercise in futility because the Court had dismissed Plaintiff's First Amendment claim on the ground of qualified immunity and on the ground that Plaintiff's speech did not meet the public concern requirement. Nevertheless, Plaintiff was permitted to file a response to Defendant's motion for summary judgment on the ground of qualified immunity.

Plaintiff filed his response on August 8, 2000. He argues Defendant is not entitled to qualified immunity because "two decisions for the U.S. Supreme Court have clearly held that the right to contact an elected representative for matters of private concern is a constitutionally protected right." In support of this argument Plaintiff quoted two Supreme Court opinions, although both were cited incorrectly. Plaintiff quoted the following language from *Thomas v. Collins*, 323 U.S. 516, 531 (1945);[1] "[t]he grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones....The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity." Plaintiff also purported to quote the following passage from *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972): "[i]n a representative democracy such as this, these branches of government act on behalf of the people, and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[2] It is unclear how these two passages, or the cases themselves, are of assistance to Plaintiff in defeating Defendant's motion for summary judgment.

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[1] Plaintiff failed to include in his brief a complete citation to *Thomas*. The short citation that Plaintiff did provide was also incorrect because it cited the case as being "516 U.S. at 531" when *Thomas* is actually located at 323 U.S. 516.

[2] Although this language appears in *California Motor*, the Supreme Court was actually quoting from an earlier Supreme Court case. *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127, 137 (1961).

In *California Transport* highway carriers filed suit against other highway carriers under the Clayton Act. The petitioners charged that the respondent's had "conspired to monopolize trade and commerce in the transportation of goods in violation of the antitrust laws. The conspiracy alleged is a concerted action by petitioners to institute state and federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or register those rights." *California Transport*, 404 U.S. at 509. In the section of the opinion citing *Eastern Railroad*, the Supreme Court concluded that groups with common interests could "without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." *Id.* at 511.

Thomas involved a habeas corpus proceeding. The appellant, Thomas, was the president of the International Union U.A.W. (United Automobile, Aircraft and Agricultural Implements Workers) and a vice president of the Congress of Industrial Organizations. *Thomas*, 323 U.S. at 520. Before he was scheduled to give a speech at a large meeting in Texas, Thomas was served with an order restraining him, "while in Texas, from soliciting members for or memberships in specified labor unions and others affiliated with the Congress of Industrial Organizations, without first obtaining an organizer's card as required by" Texas state law. *Id.* at 518. Ignoring the restraining order, Thomas spoke at the meeting and was subsequently arrested. *See id.* at 522-23. The issue in *Thomas* centered on the conflict between the State's power to regulate labor unions and the rights protected by the First Amendment. *See id.* at 532-33. The language Plaintiff cites in his brief appears in the context of the Supreme Court's discussion of whether the First Amendment

safeguards of free speech and free assembly may apply to business or economic activities. *See id.* at 531.

Neither *California Transport* nor *Thomas* address whether the public concern requirement applies to the First Amendment claims brought by an employee who enlists the aid of his state representative in resolving an employment dispute. Plaintiff's citation to these cases has failed to convince the Court that the law was clearly established that Plaintiff had a First Amendment right not be retaliated against for asking a state representative to prevent a job transfer that would require the Plaintiff to either move to Albuquerque or endure a lengthy commute. *See Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F. 2d 642, 645 (10th Cir. 1988) (stating that once a defendant raises the qualified immunity defense, the plaintiff bears the "burden of convincing the court that the law was clearly established"). Therefore, the Defendant is entitled to qualified immunity as to Plaintiff's First Amendment claim.

IT IS THEREFORE ORDERED that:

1. Defendant's Second Motion for Summary Judgment based on Qualified Immunity, (Doc. No. 69), is GRANTED; and

2. because Plaintiff's First Amendment claim has already been dismissed, no separate order of dismissal will be entered.

/s/_____
JAMES A. PARKER
UNITED STATES
DISTRICT COURT JUDGE